STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS ENFIELD,

Defendant-Appellant.

UNPUBLISHED
September 27, 2002

No. 224369
Oakland Circuit Court
LC No. 99-165935-FC

Before: Meter, P.J., and Saad and R.B. Burns*, JJ.

PER CURIAM.

Following a grand jury indictment, a jury convicted defendant of first-degree felony murder, MCL 750.316, and larceny from a person, MCL 750.357. The trial court sentenced defendant to a single term of life imprisonment without the possibility of parole.[1] Defendant appeals as of right, and we affirm.

Defendant's conviction arises out of the murder of Priscilla Ricketts. Ms. Ricketts died from injuries she suffered when defendant and codefendant, John Wilson, stole her purse and then ran her over with a sport utility vehicle.

I.

Defendant argues that the trial court erred by allowing Bradley Privette and Daniel Crowley to testify about hearsay statements made by codefendant Wilson. Specifically, Crowley testified that Wilson told him that Wilson and defendant stole a woman's purse together and that the police were looking for defendant. Bradley Privette testified that he learned from Wilson that defendant and Wilson ran over a woman while defendant was "on drugs." According to Privette, Wilson told him that the woman got in the way after defendant stole her purse and that defendant, or defendant and Wilson, did not stop to avoid hitting the woman with the SUV. The trial court ruled that Wilson's statements are admissible under MRE 804(b)(3), as statements against his penal interest.

[1] The court did not sentence defendant for the larceny conviction because it served as the predicate felony for the felony-murder conviction and, as such, was subsumed by that conviction.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

MRE 804(b)(3) provides, in pertinent part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> * * *
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> (3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Wilson was unavailable as a witness and his statement to Crowley, in which Wilson implicated himself in the purse-snatching, was clearly against his penal interest. See *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). The next inquiry is whether a reasonable person in Wilson's shoes would have believed the statements to be true and whether the circumstances of the statements sufficiently establish their trustworthiness.[2] *Id*. at 268-269. Further, to be admitted as substantive evidence against defendant, the context of the statement must render the statement sufficiently reliable. *People v Poole*, 444 Mich 151, 159-162; 506 NW2d 505 (1993).[3] Here, a reasonable person in Wilson's position would not have made the incriminating statement unless he believed it were true; Wilson essentially admitted that he and defendant were equally culpable in the crime. Moreover, the surrounding circumstances clearly suggest that the statement was trustworthy because Wilson made the statement voluntarily, without prompting, and he made it to a friend. Accordingly, Wilson's statement to Crowley clearly falls within the rule recognized in *Poole* for statements admissible under MRE 804(b)(3).

Wilson's statements to Privette present a closer question because of inconsistencies throughout Privette's testimony about what Wilson told him. At one point, Privette testified that Wilson never admitted he was involved in the crime with defendant. However, at other points in Privette's testimony, it is clear that, when he spoke to Privette, Wilson implicated himself in the crime.

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[2] This issue is determined by the trial court's findings of fact and application of the legal standards to those facts. *Barrera, supra* at 269. We review the trial court's factual findings for clear error, and we review the court's decision whether to admit or exclude the evidence in light of those facts for an abuse of discretion. *Id*.

[3] Our Supreme Court stated in *Poole, supra* at 161:

> We conclude, however, that where, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement--including portions that inculpate another--is admissible as substantive evidence at trial pursuant to MRE 804(b)(3).

At trial, Privette was impeached with his preliminary examination testimony, during which he stated that Wilson said that both he and defendant stole a woman's purse and ran her over. Also, Privette's testimony established that Wilson admitted that he was driving the vehicle used in the crime, a burgundy Jimmy owned by Pete Meli. Privette's testimony regarding Wilson's statements clearly implicated Wilson in the crime because Wilson further stated that he was the only person who had access to and was allowed to drive the Jimmy. Based on Wilson's statements and despite the inconsistencies in Privette's testimony, the trial court properly left it for the jury to decide which version of Privette's testimony to believe. Further, the circumstances show the trustworthiness of Wilson's statements because, again, Wilson made the statements to a friend and in the context of a narrative.[4] Accordingly, the trial court did not abuse its discretion by admitting the testimony under MRE 804(b)(3) and *Poole, supra*.[5]

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[4] Defendant urges this Court to follow federal law, which has more narrowly applied the federal rule, FRE 804(b)(3), to permit admission of only those portions of a witness' statement that implicate the nontestifying codefendant, not the defendant. See *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999); *Williamson v United States*, 512 US 594; 114 S Ct 2431; 129 L Ed 2d 476 (1994). This Court has already considered and rejected this argument, and determined that it is bound to follow binding precedent of our own Supreme Court rather than federal decisions applying the federal rule. *People v Beasley*, 239 Mich App 548, 551, 556-559; 609 NW2d 581 (2000); see also *People v Schutte*, 240 Mich App 713, 717, n 4; 613 NW2d 370 (2000). Therefore, defendant has not shown that the trial court erred in admitting Wilson's statements into evidence.

[5] We also reject defendant's claim that the admission of Wilson's statements to Crowley and Privette violated his rights under the Confrontation Clause. As our Supreme Court explained in *Poole*:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. [*Poole, supra* at 162, quoting *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980).]

Courts may consider a number of factors in determining whether a statement has sufficient indicia of trustworthiness and reliability to be admissible.

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates--that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
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> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes

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II.

Defendant says that the trial court erred by allowing witnesses to testify about a polygraph examination. We review for an abuse of discretion a trial court's decision regarding the admission of evidence. *People v Katt*, 248 Mich App 282, 289; 639 NW2d 815 (2001). "An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made." *Id*., quoting *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

At trial, one of defendant's cellmates, Phillip Turner, testified that he acted as a "jailhouse lawyer" and sometimes helped inmates with their cases. According to Turner, defendant asked him whether someone could "beat" a polygraph test. The trial court allowed the testimony, over defendant's objection.

"[I]t is a bright-line rule that reference to taking or passing a polygraph test is error." *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2001). Here, Turner did not testify that defendant took or passed a polygraph test. Further, as the prosecutor observes, Turner's testimony about defendant wanting to beat a polygraph test was clearly relevant to show his consciousness of guilt because it showed an attempt to avoid prosecution. See *People v Cutchall*, 200 Mich App 396, 401; 504 NW2d 666 (1993), overruled in part on other grounds in People v Edgett, 220 Mich App 686, 691-694; 560 NW2d 360 (1996); *People v Biegajski*, 122 Mich App 215, 220; 332 NW2d 413 (1982); *People v Falkner*, 36 Mich App 101, 108; 193 NW2d 178 (1971), rev'd on other grounds 389 Mich 682 (1973) ("[t]estimony showing conduct and declarations of the defendant subsequent to commission of a crime, when the behavior indicates a consciousness of guilt or is inconsistent with innocence, is admissible.")

Nonetheless, defendant insists that any reference to a polygraph test should have been prohibited as unduly prejudicial.[6] As noted, the evidence was clearly relevant. Further, we

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> the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.
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> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. . . . While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. [*Poole*, *supra* at 165.]

As noted, the circumstances surrounding Wilson's statements to both Crowley and Privette sufficiently demonstrate their reliability because the statements were made voluntarily, without prompting, and were made to friends as opposed to law enforcement officials. *Id*. Defendant has not shown that he was denied his right of confrontation.

[6] Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting

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disagree with defendant that the testimony allowed the jury to infer that defendant failed a polygraph test. Again, the testimony merely referred to defendant's *inquiry* about a polygraph test and did not indicate whether defendant ever actually took or passed a test. Accordingly, we conclude that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. MRE 403.[7]

III.

Additionally, defendant contends that the trial court reversibly erred by prohibiting him from questioning a prosecution witness, Jeffrey Schaefer, about his alleged involvement in stealing money from a client trust account. Schaefer gave testimony damaging to defendant and, accordingly, defense counsel sought to impeach Schaefer's credibility.

We review a trial court's decision concerning the scope of cross-examination for an abuse of discretion. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). At trial, defense counsel stated that he received the information about Schaefer's handling of the client trust fund account from an unnamed source, who allegedly was familiar with Schaefer's former law practice and was aware of the missing money. The trial court refused to allow the line of inquiry because there was no documentation or records substantiating the accusation.

Defendant argues that he should have been allowed to cross-examine Schaefer on this issue under MRE 608(b), which provides:

> **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

If Schaefer stole a client's funds, that evidence might constitute evidence of Schaefer's character for untruthfulness, as contemplated by MRE 608(b). However, a party who seeks to question a witness about specific instances of conduct under MRE 608 must establish a proper foundation for the testimony. *People v Adams*, 122 Mich App 759, 765; 333 NW2d 538 (1983), remanded

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considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). See also *People v Vasher*, 449 Mich 494, 501-502; 537 NW2d 168 (1995).

[7] We note that another inmate witness, Derrick Tanner, testified that defendant attempted to escape from custody when he was on his way to take a lie detector test. Again, however, the witness did not testify that defendant actually took or passed a test. Further, the reference was isolated, inadvertent, and defendant did not seek a cautionary instruction. *Nash*, *supra* at 98. Accordingly, defendant is not entitled to relief on this issue.

417 Mich 1073 (1983), remand order amended 419 Mich 913 (1984), rev'd 421 Mich 865 (1985).[8] Here, it appears that the trial court correctly concluded that defendant failed to established a proper foundation for the proposed line of questioning because there was no independent evidence substantiating the matter.

We further note that, were we to find that the trial court erred by limiting defendant's cross-examination on this issue, any alleged error was clearly harmless. A "preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defense counsel extensively cross-examined Schaefer about his disbarment and his record of felony convictions involving theft, dishonesty, and drug possession. Defense counsel also established that, based on Schaefer's record, the State Bar might revoke his license to practice law. On this record, it is not more probable than not that the jury would have viewed Schaefer's credibility less favorably had the trial court admitted the disputed reference to the trust account. Therefore, because any alleged error was not outcome determinative, defendant is not entitled to relief on this issue. *Lukity, supra*.

IV.

Defendant also asserts that defense counsel was ineffective because he conceded that some of defendant's prior convictions were admissible for impeachment purposes. Because defendant did not raise this issue in a motion for a new trial or a *Ginther*[9] hearing, our review is limited to mistakes apparent on the record. *People v Watkins,* 247 Mich App 14, 30; 634 NW2d 370 (2001), lv granted in part ___ Mich ___ (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr,* 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant asserts that his convictions for attempted breaking and entering of a dwelling, attempted unlawfully driving away of an automobile (UDAA), and uttering and publishing, were

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[8] The Supreme Court reversed this Court's decision without explanation. This Court originally determined that there was no foundation for certain questions posed. It appears that, after the case was remanded by the Supreme Court for an evidentiary hearing, the Court found that there was a factual basis for the questions posed in the case.

[9] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

not admissible under MRE 609 because they involved only theft offenses, were only marginally probative of his veracity, and were too closely related to the charges in this case.

A conviction is not admissible under MRE 609 if "more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction . . . ." If the prior conviction contains an element of dishonesty or false statement, the conviction is admissible under MRE 609. *People v Parcha*, 227 Mich App 236, 241; 575 NW2d 316 (1997). If not, the trial court must decide if the conviction contains an element of theft. *Id*. If that element is shown, the court must determine if the crime is punishable by more than one year in prison and, where the witness is the defendant, whether the probative value of the evidence outweighs its prejudicial effect. *Id*. at 241-242. Because defense counsel ultimately stipulated to the admission of the prior convictions, the trial court did not rule on these issues.

Each of the three convictions were less than ten years old at the time of trial. Further, the crime of uttering and publishing contains as an element the intent to defraud and is, therefore, admissible under MRE 609(a)(1). *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). While the simple crime of breaking and entering does not necessarily involve an element of theft, the information charging defendant as a habitual offender shows that defendant was convicted of attempted breaking and entering a building with the intent to commit larceny.[10] See *People v Cornell*, 466 Mich 335, 360; 646 NW2d 127 (2002). Therefore, the conviction involved an element of theft for purposes of MRE 609. Further, the breaking and entering conviction was punishable by imprisonment in excess of one year and was arguably probative of defendant's veracity. Because these convictions were admissible under MRE 609, defense counsel's decision to elicit the evidence on direct examination was a matter of trial strategy, which we will not second-guess. *People v Knapp*, 244 Mich App 361, 386-387 n 7; 624 NW2d 227 (2001).

UDAA, unlike larceny, does not include as an element the intent to permanently deprive the victim of his property and, therefore, does not include an element of theft. *People v Murph*, 185 Mich App 476, 480-481; 463 NW2d 156 (1990), modified on other grounds 190 Mich App 707. Accordingly, and despite defense counsel's error in conceding that the UDAA conviction is admissible, it appears that the conviction should not have been raised or admitted under MRE 609. However, this error is not "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *People v Mitchell*, 454 Mich 145, 164-165; 560 NW2d 600 (1997), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984).

Moreover, defendant has failed to show that trial counsel's error resulted in prejudice. In addition to the two convictions above, the jury heard ample evidence regarding defendant's conduct. Testimony established not only that defendant was a heroin addict and that he committed this crime to support his drug habit, defendant also admitted that he forged a check that belonged to his grandmother to buy drugs. Furthermore, defendant admitted that he struck the victim with the SUV and the physical evidence clearly showed that this was not an accident.

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[10] Defendant has not shown that the breaking and entering conviction did not involve the intent to commit larceny.

In light of this and other overwhelming evidence, there is no reasonable probability that the outcome of the case would have been different had the UDAA conviction been excluded. *Pickens, supra*; *Johnson, supra*. Accordingly, defendant was not denied the effective assistance of counsel.

V.

Finally, defendant contends that the prosecutor engaged in misconduct during his closing argument. Because defendant did not preserve this issue with an appropriate objection at trial, defendant must show that a plain error affected his substantial rights. *Carines, supra*; *Schutte, supra* at 720.

In his rebuttal argument, the prosecutor told the jury that, based on the evidence at trial, defendant's testimony was not worthy of belief. The prosecutor also described defendant's testimony as "the Gospel of St. Enfield."

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267, nn 5-7; 531 NW2d 659 (1995). In closing arguments, a prosecutor is afforded great latitude and is permitted to argue the evidence and make reasonable inferences in support of his theory of the case. *Id*. at 282. However, the prosecutor must refrain from making prejudicial remarks. *Id*. at 283. While prosecutors have a duty to see to it that a defendant receives a fair trial, prosecutors may use "hard language" when it is supported by the evidence. Prosecutors are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). A prosecutor is also free to argue that a witness, including the defendant (or the defense theory), is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Also, remarks which might otherwise appear improper will not necessarily constitute reversible error if the remarks are made in response to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

It is clear from the context of the prosecutor's reference to "the Gospel of Saint Enfield" that the remarks were intended as tongue in cheek comments, and that the prosecutor was attempting to reinforce his theory that defendant lied during his testimony and that it should not be accepted as credible. Contrary to defendant's assertions, the prosecutor's comments were clearly not an attack on defendant's religious beliefs, but merely a comment on his lack of credibility. Defendant has failed to show that the remarks, through sarcastic in nature, rise to the level of plain error.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns